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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re DUSTIN D., a Person Coming Under the Juvenile Court Law.	B221776 (Los Angeles County Super. Ct. No. CK49140)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. BRET D., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Marilyn Mackel, Juvenile Court Referee. Affirmed.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Jeanette Cauble, Deputy County Counsel, for Plaintiff and Respondent.

We affirm the juvenile court's termination of father Bret D.'s parental rights over his son Dustin. We reject father's contention that he did not receive adequate notice of the continued Welfare and Institutions Code section 366.26 hearing.[1]

FACTUAL AND PROCEDURAL BACKGROUND

Dustin was born in December 2002 and was placed in father's custody in 2004 after his mother had been arrested.[2]

1. *Petition and Detention*

On July 27, 2007, the Department of Children and Family Services (DCFS) filed a section 300 petition alleging that father failed to protect Dustin. As subsequently amended and sustained, the petition alleged that father failed to appropriately supervise Dustin resulting in Dustin's ingestion of Gamma Hydroxybutyrate (GHB also known as the date rape drug). As a result of his ingestion of GHB, Dustin vomited, lost consciousness, and required hospitalization. DCFS further alleged that father's inappropriate supervision placed Dustin at risk of physical harm. On July 27, 2007, the court found a prima facie case for detaining Dustin.

2. *Reunification Period*

On July 27, 2007, father was ordered into a drug rehabilitation program with random drug testing and was ordered to attend individual counseling. On November 5, 2007, father was ordered to provide eight random drug tests, and if any test were positive, to complete a drug rehabilitation program. Father was

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[1] Undesignated statutory citations are to the Welfare and Institutions Code.

[2] Father was Dustin's presumed father. The petition also contained allegations with respect to mother. Mother died during the course of these proceedings. Because mother is not a party to this appeal, we need not summarize the facts relevant only to her.

ordered to enroll in a parenting course, a fatherhood group, and individual counseling. After 16 months of unsuccessful reunification services, father's reunification services were terminated on November 17, 2008.

3. *Father's Section 388 Motion*[3]

Eight months later, on July 16, 2009, father filed a motion to change a court order and requested additional reunification services. Father supported his motion with his statements that he had completed a drug rehabilitation program and was able to provide a stable home for Dustin. To better evaluate father's motion, the juvenile court ordered a "bonding study" to assess Dustin's bond to father.

Father failed to follow through with the "bonding study," which required him to meet with an appointed psychologist. Father had not provided a working phone number, and as a result, the appointed psychologist and social worker were unable to schedule father's evaluation. In a letter to the court explaining his inability to conduct the study, the psychologist wrote that father "apparently called [his social worker] and said he would not be able to make [a] visit [on August 24, 2009] because he was in Las Vegas." The psychologist also reported that father did not contact the social worker about the bonding study, and that both the psychologist and the social worker had been unsuccessful in trying to reach him.

Father did not appear at a hearing scheduled for September 1, 2009, despite having been in court on July 22, when the court ordered him to return on that date. The court continued the September 1 hearing. On September 28, 2009, the court

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[3] Section 388, subdivision (a) provides in relevant part: "(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made . . . . The petition . . . shall set forth in concise language any change of circumstance or new evidence which [is] alleged to require the change of order or termination of jurisdiction."

denied father's section 388 motion. The court concluded that father's failure to appear at the hearing on his section 388 motion reflected his lack of commitment to Dustin.

4. *Notice of the Section 366.26 Hearing*

On May 7, 2009, father was personally served with notice of a section 366.26 hearing to be held on July 22, 2009. Notice indicated that the social worker recommended "[t]ermination of parental rights and implementation of a plan of adoption." The court found that notice was proper. Father appeared at the hearing on July 22, 2009. The hearing was continued to September 28, 2009, for a contested section 366.26 hearing. Father did not appear on September 28, 2009, and the court continued the hearing until December 21, 2009, and ordered DCFS to "provide mail notice" for the December 21 hearing. Father's counsel did not object to that method of notice.

At a hearing on October 2, 2009, the court inquired whether there was any objection to notice of the December section 366.26 hearing by first-class mail. No one objected. The court's October 2, 2009 minute order states, "PROVIDE FATHER NOTICE FOR NEXT HEARING ONLY FIRST CLASS MAIL NOTICE REQUIRED." DCFS sent father notice by first-class mail to his last known address informing him of the December 21st continued section 366.26 hearing.

5. *Section 366.26 Hearing*

On December 21, 2009, the court found that notice of the continued section 366.26 hearing was proper. The court also indicated that father had made himself unavailable. The court stated that if father was not at his address of record it was his responsibility to notify the court. Father's counsel neither objected nor argued that notice was improper.

Father's counsel argued, however, that she "believe[d] my client would be inclined to set this matter for contest." The court indicated it was prepared to go forward with the contest. In response, father's counsel stated that father had informed her in November 2009 that he had been incarcerated in Las Vegas from September 2009 through sometime in November. The court indicated its belief that if counsel had spoken with father in November, he had notice of the hearing.[4] Father's counsel did not dispute the court's conclusion.

The juvenile court denied father's counsel's request for a continuance to secure his presence at the hearing. Dustin's counsel argued in favor of terminating father's parental rights and having Dustin's caretakers and de facto parents adopt him. The court terminated father's parental rights.

DISCUSSION

The purpose of a section 366.26 hearing is to determine a permanent plan for the dependent child. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 253.) It is undisputed both that father has a due process right to notice of the section 366.26 hearing and that section 294 codifies the required notice for a section 366.26 hearing. (See *In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1418 ["parents are entitled to due process notice of juvenile proceedings affecting their interest in custody of their children"]; *In re Jasmine G.* (2005) 127 Cal.App.4th 1109, 1113 [section 294 governs notice of a section 366.26 hearing].)

Father argues that he was denied due process and that under section 294, he was required to receive notice by certified mail. As we explain, father's arguments are forfeited and lack merit.

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[4] Although the court initially stated, "[t]here's nothing to indicate that he knows of this court hearing," the court's later comments indicated it believed father had notice of the hearing.

1. *Forfeiture*

Father failed to raise the issue of notice in the juvenile court and therefore has forfeited it. (*In re P.A.* (2007) 155 Cal.App.4th 1197, 1209 ["Because defective notice and the consequences flowing from it may easily be corrected if promptly raised in the juvenile court, [father] has forfeited the right to raise these issues on appeal"].) Father's statement that his "counsel requested a continuance to enable Father to be given notice of the hearing and an opportunity to be present" is inaccurate. As father concedes in his reply brief, his counsel did not object to notice but only requested a continuance to secure father's presence at the section 366.26 hearing.[5] Additionally, father acquiesced in the receipt of notice by first-class mail by failing to object at the October 2, 2009 hearing, when the court expressly asked if anyone objected to notice by first-class mail.

2. *Due Process*

Father relies on the following undisputed legal principle: "due process requires 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" (*In re Melinda J.*, *supra*, 234 Cal.App.3d at p. 1418; *In re Jasmine G.*, *supra*, 127 Cal.App.4th at p. 1113 [due process requires notice reasonably calculated to advise parents action is pending]; *In re DeJohn B.* (2000) 84 Cal.App.4th 100, 106 [same].) In this case, notice was reasonably calculated under all the circumstances -- including the fact that father did not apprise the

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[5] Under section 352, the juvenile court may grant a continuance of any hearing only on a showing of good cause and only if the continuance is not contrary to a child's best interests. Father neither argues nor shows that there was good cause to continue the hearing or that it was in Dustin's best interest to continue the hearing. (See *In re J.I.* (2003) 108 Cal.App.4th 903, 912 [no abuse of discretion in refusing to grant a continuance where mother did not appear at hearing terminating her parental rights after DCFS mailed notice to mother's last known address].)

social worker or the court of his relocation -- to apprise father of the pendency of the section 366.26 hearing.

Father's due process challenge rests upon a characterization of the record unsupported by the facts. In essence, father claims the social worker was aware of father's relocation to Las Vegas, yet made no effort to contact him. In fact, the record shows far less. It shows that on or about August 24, 2009, father notified the social worker that he was "in Las Vegas" and unable to attend a visit scheduled for that day. There is no evidence father notified the social worker that he had relocated to Las Vegas.[6] Nor is there evidence he apprised the social worker in August, or at any later time, that he could no longer be reached at his last-known address, or that he provided her with a new address or phone number. In short, there is no evidence that prior to the December hearing, father notified the social worker of a change in his residence address.

Nevertheless, father's counsel's representations at the December hearing established that she had been in touch with father in November -- well after the court had set the continued section 366.26 hearing for December. Counsel did not suggest she had failed to advise father of the December hearing; nor did she claim he was unaware of it.

It was father's responsibility to inform the social worker of any change in his residency. (*In re Raymond R.* (1994) 26 Cal.App.4th 436, 441 ["Once a parent has been located, it becomes the obligation of the parent to communicate with the Department"].) Father concedes that he did not "advise the juvenile court of his whereabouts . . . ." Under all of the circumstances -- which here include father's

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[6] As respondent notes, there was evidence father had previously worked out of state, without claiming to have changed his California residence or to have failed to receive notice of prior hearings sent to his California address.

failure to keep the court and social worker informed of his whereabouts -- notice was reasonably calculated to apprise father of the hearing. (See *In re Phillip F.* (2000) 78 Cal.App.4th 250, 260 [notice by first class-mail of a continued hearing is sufficient to satisfy due process].) This is especially true where father knew of the section 366.26 hearing, knew that it had been continued, and spoke to his counsel in November 2009, a month prior to the continued hearing. (See *In re Desiree M.* (2010) 181 Cal.App.4th 329, 335 [court could infer that child's counsel informed children of section 366.26 hearings].)

3. *Statutory Notice*

Finally, we reject father's claim that he was entitled to notice by certified mail under section 294. Section 294 requires notice be given to presumed and alleged fathers and provides in pertinent part: "(c)(1) Service of the notice shall be completed at least 45 days before the hearing date. Service is deemed complete at the time the notice is personally delivered to the person named in the notice or 10 days after the notice has been placed in the mail, or at the expiration of the time prescribed by the order for publication. [¶] . . . [¶] (d) Regardless of the type of notice required, or the manner in which it is served, once the court has made the initial finding that notice has properly been given to the parent, or to any person entitled to receive notice pursuant to this section, *subsequent notice for any continuation of a Section 366.26 hearing may be by first-class mail to any last known address*, by an order made pursuant to Section 296, or by any other means that the court determines is reasonably calculated, under any circumstance, to provide notice of the continued hearing. However, if the recommendation changes from the recommendation contained in the notice previously found to be proper, notice shall be provided to the parent, and to any person entitled to receive notice pursuant to this section, regarding that subsequent hearing. [¶] . . . [¶] (f) Notice to the parents may be given in any one of the following manners: [¶] (1) If the

parent is present at the hearing at which the court schedules a hearing pursuant to Section 366.26, the court shall advise the parent of the date, time, and place of the proceedings, their [*sic*] right to counsel, the nature of the proceedings, and the requirement that at the proceedings the court shall select and implement a plan of adoption, legal guardianship, or long-term foster care for the child. The court shall direct the parent to appear for the proceedings and then direct that the parent be notified thereafter by first-class mail to the parent's usual place of residence or business only. [¶] (2) Certified mail, return receipt requested, to the parent's last known mailing address. This notice shall be sufficient if the child welfare agency receives a return receipt signed by the parent. [¶] (3) Personal service to the parent named in the notice. [¶] (4) Delivery to a competent person who is at least 18 years of age at the parent's usual place of residence or business and thereafter mailed to the parent named in the notice by first-class mail at the place where the notice was delivered. [¶] (5) If the residence of the parent is outside the state, service may be made as described in paragraph (1), (3), or (4) or by certified mail, return receipt requested. . . ." (§ 294, italics added.)

The section 366.26 hearing was originally set for July 22, 2009. Father received notice that the social worker recommended terminating parental rights and implementing a plan of adoption.[7] ~(CT 538, 540-541)~ Father appeared at the hearing, and does not challenge the adequacy of notice for that hearing.

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[7] Father does not argue on appeal that the notice he received was deficient because DCFS briefly changed its recommendation to legal guardianship. (See § 294, subd. (d).) In any event, such contention would fail. Although DCFS's recommendation temporarily changed to legal guardianship in order to ascertain the consequence of mother's death, father had received the notice of the July 22, 2009 hearing recommending adoption. Stated otherwise, the permanent plan implemented at the December hearing had not changed from the notice father received for the July hearing. The court expressly found that notice by first-class mail under such circumstances was appropriate, and we agree.

Thereafter, under subdivision (d) of section 294, father was entitled to notice by first-class mail. Because father was sent notice by first-class mail to his last known address, the statutory notice requirements were satisfied. Father's reliance on section 294, subdivision (f)(2) for the proposition that DCFS should have sent him notice by certified mail is misplaced, because the December hearing was a continued section 366.26 hearing, not an originally scheduled hearing. (See § 294, subds. (d), (f)(1).)

DISPOSITION

The order terminating father's parental rights is affirmed.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.